

Letter of Findings: 04-20170549
Sales & Use Tax
For the Years 2013 - 2015

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Company that failed to keep sufficient books and records as required by law did not meet its burden of proof regarding its challenge to the audit methodology; the Department's Audit Division, however, will review invoices provided by the Company as part of its protest.

ISSUES

I. Sales & Use Tax—Audit Methodology.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-4; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Scopelite v. Indiana Dept. of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012).

Taxpayer protests the Department's proposed assessments.

II. Tax Administration—Penalty and Interest.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; IC § 6-8.1-10-1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a penalty and interest.

STATEMENT OF FACTS

Taxpayer operates a store that is a gas station and a food mart. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for the tax years 2013 through 2015. As a result of the Department's audit, Taxpayer was issued proposed assessments for base tax, penalty, and interest. Taxpayer filed a protest. A telephone hearing was held and this Letter of Findings results. More facts will be provided below as needed.

I. Sales & Use Tax—Audit Methodology.

DISCUSSION

As a threshold issue, all tax assessments are *prima facie* evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dept. of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Regarding the audit, it should also be noted at the outset that Indiana law requires taxpayers to maintain books and records. As IC § 6-8.1-5-4(a) states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Turning to the Audit Report, it states that "[m]ultiple requests for records were made from both the taxpayer and his Power of Attorney representative (POA)." The Audit Report notes that:

The taxpayer did not provided all the records requested even after multiple requests through both emails and phone calls. Due to lack of response from the taxpayer and the POA, the records provided were used to perform the audit. Records provided include federal and Indiana S Corporation income tax returns, bank statements for two bank accounts and partial bank statements for a third account for the ATM machine, purchase invoices, and cash register closing tapes (Z Tapes). Fuel records were requested from their vendor, [company L], for calendar year (CY) 2015 to compare to the Z tapes.

Because of the lack of information provided by the taxpayer, the audit was conducted using the IRS Audit Guide Method (Bizstats) for cash intensive businesses. The method per audit involves review of the purchase invoices and marking up the total purchases by the gross profit percentage per Bizstats [].

Finally, it should be noted that while "records were incomplete for all years of the audit" that calendar year "2015 was the year with the most records available and was selected for detail review."

Taxpayer's protest letter states that it "disagrees with the audit methodology as the auditor should have used the z-tapes and other supporting documentation provided by the Taxpayer and his accountant." Taxpayer argues that the "use of an arbitrary gross profit percentage in lieu of the Taxpayer's records was erroneous." In follow-up correspondence to the Department, Taxpayer states that it was providing "missing invoices for the 2015 tax period" for soda bottling/distributing companies. Taxpayer states that the audit listed these specific invoices as missing and thus "an estimate was used by the auditor."

IC § 6-8.1-5-1(b) states in relevant part that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." Taxpayer asserts that it "disagrees with the audit methodology," but it is statutorily required for Taxpayer to keep books and records ("all source documents") pursuant to IC § 6-8.1-5-4(a) so that the Department can determine any tax due by Taxpayer. The Department also notes that when an agency is charged with enforcing a statute, the courts defer to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Taxpayer has not met its burden of proof regarding its overall challenge to the audit methodology. However, to the extent that any of the specific documentation (i.e., invoices) provided with its protest is relevant documentation that was not available for review at the time of the audit, the Legal Division requests that the Audit Division review any said documentation and make any adjustments that are warranted.

FINDING

Taxpayer's protest of the audit methodology is denied. However, the Audit Division is requested to review the documentation (i.e., invoices) provided by Taxpayer as part of the protest and to make any adjustments that are warranted.

II. Tax Administration—Penalty and Interest.

Taxpayer protests the imposition of the ten percent negligence penalty. In a letter to the Department, Taxpayer states the following in relevant part:

Taxpayer maintained reasonable records of its activities and timely filed its Sales & Use Tax Returns and thus its actions were reasonable in light of [45 IAC 15-11-2\(c\)](#). Furthermore, the Taxpayer has not had compliance issues in the past.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code—[45 IAC 15-11-2](#)—further provides in relevant part:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

As was seen in **Issue I** (*supra*), a key point of the audit's findings was that Taxpayer did not properly maintain records pursuant to IC § 6-8.1-5-4. Thus Taxpayer is incorrect when it asserts that it "maintained reasonable records." The audit report is replete with references to problems with Taxpayer's recordkeeping—e.g., "[m]ultiple requests for records were made from both the taxpayer and his Power of Attorney," "taxpayer did not provide all the records requested," "[d]ue to lack of response from the taxpayer and the POA, the records provided were used to perform the audit," "lack of information provided by the taxpayer," "[s]ince documentation was not provided for these sales, none of the taxable sales paid for with food stamps were reclassified."

The Department finds that Taxpayer has not established it exercised ordinary business care and prudence under [45 IAC 15-11-2\(c\)](#). Taxpayer has not met its burden of proof under IC § 6-8.1-5-1(c). Lastly, by statute interest cannot be waived. See IC § 6-8.1-10-1(e).

FINDING

Taxpayer's protest of the penalty and interest is denied.

SUMMARY

Taxpayer's protest of the audit methodology for Issue I is denied, although the Audit Division is requested to review the documentation provided by Taxpayer with its protest; for Issue II, Taxpayer's protest of penalty and interest is denied.

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